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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1548

JOSEPH MAIORANI,

Petitioner,

—against—

KAWASAKI KISEN K.K., KOBE,

Respondent,

—against—

PITTSTON STEVEDORING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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POINT I

The Matter, Being Procedural, Already Affirmed by the Court of Appeals, Is Not Subject to Review by Writ of Certiorari.

While on occasion, the Supreme Court will grant certiorari on procedural or evidentiary matters which, for example, would have universal bearing on the administration of criminal justice, *Jencks* v. *United States*, 353 U.S. 657, or to civil litigation in the federal courts, *Sibach* v.

Wilson v *Co., Inc.*, 312 U.S. 1, or to the construction and application of a specific Federal Rule of Civil Procedure, *Schlagenhauf* v. *Holder*, 379 U.S. 104, ordinarily those matters which deal with the interpretation of adjective, or procedural law are left to the discretion and interpretation of the lower courts. 36 Corpus Juris Secundum, Federal Courts, Sec. 204 (17), page 664.

This is especially so when the action of the District Court has been affirmed by the Court of Appeals, *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, 4 L. Ed. d 30, 80 Sup. Ct. 16 (cf. 379 U.S. 829).

As stated in *Palermo* v. *United States*, 360 U.S. 343, at page 353:

> ". . . Final decision as to production must rest, *as it does so very often in procedural and evidentiary matters* (italics added), within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts."

Nothing could be more procedural or more local than a District Court's disposition of its own cases. The power is both ancient in origin and inherent in nature. *Link* v. *Wabash Railroad Co.*, 370 U.S. 326; *American Pipe & Construction Co.* v. *Pence*, 9 Cir., 393 F. 2d 568, certiorari denied, 393 U.S. 842.

As stated in *CMAX* v. *Hall*, 9 Civ., 300 F. 2d 265, at page 268:

> "A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel and for litigants. The exertion of this power calls for the exercise of a sound discretion."

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There can be no question that the district courts, Rule 83, Fed. Rule Civ. Proc. 28 U.S.C.A., as well as the Supreme Court, 28 U.S.C.A. 2072, has the power to make rules governing its own practice. The rules in question were such rules. It will be noted that both the Court of Appeals (Pet's App. D-3) and the District Court (App. E-3) found that, besides the lack of proper procedure for adjournment by the plaintiff under these rules, there were other persons who could have acted as substitutes, all of which would have made it unnecessary for plaintiff to even consider having to conform to such procedure in the first instance.

POINT II

The Petition Should Not Be Entertained in any Event.

As heretofore noted, when a court of appeals concurs with the district court, certiorari is not ordinarily granted, *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, supra; cf. 36 Corpus Juris Secundum, Federal Courts, Sec. 204 (21), page 669.

In addition, there is clear precedent for the determination of the said two lower courts, *Link* v. *Wabash Railroad Co.*, 370 U.S. 626.

In the cited case the failure to appear was only a pretrial. Plaintiff was unrepresented when the dismissal was ordered. In this case, the trial was about to commence and the plaintiff was represented (App. E-3). More than dilatoriness, or want of prosecution, there was refusal.

Respectfully submitted,

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